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IN THE

Supreme Court of the United States

October Term, 1953

No. 772

LAKE ONTARIO LAND DEVELOPMENT AND BEACH PROTECTION ASSOCIATION, INC. (Also Known as Lake Ontario Land Owners and Beach Protective Association, Inc.), *Petitioner.*

vs.

FEDERAL POWER COMMISSION, *Respondent*

and

GREAT LAKES-ST. LAWRENCE ASSOCIATION, POWER AUTHORITY OF THE STATE OF NEW YORK, *Intervenors.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Ap-

peals for the District of Columbia Circuit entered in the above cause on January 29, 1954 (R. 436).

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 422 to 434 inclusive of the record. Said opinion has not been otherwise published.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 29, 1954 (R. 436). The jurisdiction of this Court is invoked under Section 1254 (I), 28 U.S.C. of the Judicial Code.

QUESTION PRESENTED

Whether the Petitioner has been deprived of his constitutional rights in that the order of the Federal Power Commission, granting a license to the Power Authority of the State of New York, takes the Petitioner's property without just compensation in violation of the Fifth Amendment of the United States Constitution.

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the Constitution of the United States, the Boundary Waters Treaty of 1909 and the Statutes are hereinafter discussed in the argument, and are set out in the appendix to this argument and brief.

STATEMENT OF THE CASE

Petitioner is an association composed of approximately 1500 members whose properties border on Lake Ontario. The properties in most cases include the members' homes. Petitioner is incorporated under the laws of the State of New York as a non-profit association for the purpose of protecting its members from man-made high water in Lake Ontario.

The Power Authority of the State of New York, on September 22, 1952, filed an amended application with the Federal Power Commission seeking authority to construct and operate a proposed hydro-electric project jointly with the Ontario Hydro-Electric Commission of Ontario, Canada, a governmental agency created by the Province of Ontario. The project is to be located in the International Rapids Section of the St. Lawrence River, extending from the United States shore to the Canadian shore of the river.

On October 29, 1952, the International Joint Commission signed an order, approving the applications filed June 30, 1952 by the Governments of the United States and Canada "(A. 357)".

Petitioner was permitted to intervene in the proceeding before the Respondent known as Project No. 2000 on November 13, 1952 "(A. 99)".

Petitioner appeared by Counsel "(A. 273)", cross-examined witnesses "(A. 274-278; 283-285)", filed a brief and participated in oral argument before the presiding examiner, and filed exceptions to the decision, findings and order of the presiding examiner with the Federal Power Commission.

The Commission issued an "Opinion and Order" on July 15, 1953, granting in substance the license requested by the Power Authority of the State of New York "(A. 192)". Petitioner thereupon filed a petition for rehearing on August 14, 1953 "(A. 249)" together with a motion for leave to adduce additional evidence both of which the Commission denied in an order issued on September 4, 1953.

On October 30, 1953, Petitioner filed a petition for review of Respondent's "Opinion and Order" with the United States Court of Appeals for the District of Columbia Circuit "(A. 2)" and in the prayer for relief requested that the findings and conclusions therein contained be modified in accordance with the proper judicial construction of the Constitution of the United States. On January 29, 1954, the United States Court of Appeals for the District of

Columbia Circuit entered a judgment and decree affirming the order of the Respondent. On February 12, 1954, Petitioner filed a petition for rehearing en banc with the United States Court of Appeals for the District of Columbia Circuit. This petition was denied by an order of the United States Court of Appeals for the District of Columbia Circuit on February 18, 1954.

Water levels in Lake Ontario in excess of 247 feet are gravely injurious to the lands and homes of the members of the Association "(A. 273, 274)"; there is a direct relationship between the levels which will be created up stream of the Iroquois Dam by the construction and operation of the dam and the levels of Lake Ontario "(A. 283, 284)". The applicant proposes and Respondent has permitted the use of "Method of Regulation No. 5" for the control of the levels of water upstream of the Iroquois Dam "(A. 283)". With the use of this Method, applicant will create levels of water upstream of the Iroquois Dam which will in turn create levels of water in Lake Ontario in excess of 247 feet and up to 249.10 feet on occasions. "(A. 283, 284)".

One of the requirements of Method of Regulation No. 5 states in effect that the natural level of Lake Ontario will be the artificial level realized in the past under the impeding effect of Gut Dam "(A. 379)".

The Power Authority of the State of New York takes no position as to the proper natural levels of Lake Ontario "(A. 275)" or at least concedes that the estimates it had been using and which had been prepared by the Special Projects Branch, Department of Transport, Government of Canada did not take into account the impeding effect of the Gut Dam located in the International Rapids Section of the St. Lawrence River by Canada or the additional water discharged into the Great Lakes system by the Canadian diversion of the natural flow of the Long Lac and Ogoki Rivers or the diversions from the Great Lakes system by the Chicago Drainage Canal "(A. 284, 285)".

The Power Authority of the State of New York has made no study as to the possible damage to lands on the southern shore of Lake Ontario which might result from the project and does not know of any study made by anyone. The applicant made no estimate of the costs of condemnation or compensation for damages to lands or homes adjoining Lake Ontario "(A. 275, 276)". The Power Authority of the State of New York takes the position that even the payment of $100,000,000 damages to the land owners around Lake Ontario would not impair the economic desirability of the project (R. 297).

REASONS FOR GRANTING THE WRIT

Petitioner asserts that a writ of certiorari should be granted in this case because of the large number of American citizens whose properties will be taken by the license in question and because of the broad implication of the lower Court's refusal to consider the effect of Article 19 of the license in domesticating and incorporating the applicable provisions of an order of an international tribunal when in effect it takes the property of Petitioner without just compensation, as required by the Fifth Amendment to the United States Constitution. A substantial and novel question is involved: Whether any immunity from review by United States courts, that may be enjoyed by international tribunals, is lost when the order of such tribunal in question requires incorporation in an order of a United States agency to be effective and when the order of such tribunal jeopardizes property rights guaranteed by the United States Constitution.

ARGUMENT AND BRIEF

The license under review violates the Fifth Amendment to the Constitution of the United States by taking the property of members of Petitioner without just compensation.

The license domesticates and incorporates the order of the International Joint Commission as follows:

> "Article 19. In the design, construction, maintenance and operation of the project covered by this license, the Licensee shall comply with all applicable provisions and requirements of the Order of Approval (International Joint Commission Docket 68) issued October 29, 1952, by the International Joint Commission to the Governments of the United States and Canada for the construction of certain works for the development of power in the International Rapids Section of the St. Lawrence River." "(A. 214)"

Without Article 19 of the license there is no privity between the Power Authority of the State of New York and the International Joint Commission since the United States and not the Power Authority of the State of New York was the applicant before the International Joint Commission. Until the "applicable provisions and requirements * * *" were made effective in Article 19, they did not hurt Petitioner. Article 19 takes without any compensation or any remedy the properties of Petitioner's members in the following manner: One of the "applicable provisions and requirements * * *" incorporated in the license is Method of Regulation No. 5. "(A. 363)" Requirement (a) of this Method authorizes and directs the setting of the water level of Lake Ontario in the following words:

> "(a) To keep the fluctuation of the levels of Lake Ontario within the levels that would have resulted in the past, assuming a continuous diversion of 3200 c.f.s. at Chicago in present outlet conditions."

On October 29, 1952, when Method of Regulation No. 5 was included in the order of the International Joint Commission, the Gut Dam, constructed by Canada, was and had been for a number of years in the St. Lawrence River and had impeded the flow of waters, thereby raising the natural levels of Lake Ontario. This impeding effect is the reason why the International Joint Commission ordered the removal of Gut Dam "(A. 365)" and the reason why the date of removal was stated as follows:

"* * * as soon as river conditions and the protection of down river and other interests that will be affected during its removal will permit, thereby advancing the time of removal of Gut Dam; * * *" "A. 359)"

Plate No. 9 (R. 417 A), which is part of the engineering date on which Method of Regulation No. 5, forming part of the order, is based, indicates that Gut Dam raised the natural levels at Oswego (Lake Ontario) from nine to eleven inches during high water. The "applicable provisions and requirements * * *" of Article 19 gives effect to the order of the International Joint Commission and wrongfully authorizes and directs levels for Lake Ontario, which had been artificially raised by Gut Dam, in continuing the levels of the past instead of decreeing natural levels. In so doing, the Respondent gives to the Power Authority of the State of New York and Canada the amount of properties belonging to the members of Petitioner which will be appropriated by the nine to eleven inches of flooding, shown in Plate No. 9 (R. 417A). Because of the low lying character of many of the properties, this amounts to the total taking of the properties of a substantial number of Petitioner's members at high water and the taking of a material portion of the properties of others. The worth of the properties thus taken runs into millions of dollars (R. 419).

Method of Regulation No. 5 states as one of its 8 requirements that one of the purposes in setting the water for the project is to unnaturally increase the waters of Lake Ontario as follows:

"(g). To hold back the natural excess outflow during the early summer months, in order to raise the ordinary levels of Lake Ontario; * * *" "(A. 380)".

Again, in Requirement (c), the plan is to retard natural outflow for the benefit of power operation, thereby raising Lake Ontario:

"(c). To maintain low flows during the winter period December 15 to March 31 in order that the difficulties of winter power operation may not be aggravated; * * *" "(A. 379)".

When requirements (c), (d) and (e) and (g) are read together, they add up to nothing more nor less than a retarding of the natural outflow from Lake Ontario from December 15 through the month of May each year, the very period when Petitioner needs every bit of the Lake's discharge since the latter part of May and June is the usual period of maximum high water in Lake Ontario.

Requirement (f), "(A. 380)", departs from nature's level in requiring only the "monthly mean" discharges to be within nature's limit. One unnatural high level combined with a storm would do millions of dollars worth of damage to Petitioner's members and it would be small comfort at the end of the month amid the resulting wreckage to read that officially the "monthly mean" discharge was within natural limits.

So it can readily be seen that the "applicable provisions and requirements * * *" putting into effect Method of Regulation No. 5 not only takes the properties that will be flooded by the nine to eleven inches indicated in Plate No. 9 by wrongfully referring to the levels of the past as natural levels, but in addition thereto will cause an additional elevation of Lake Ontario with Method of Regulation No. 5. In this connection, it should be noted that Lake Ontario front damage occurs when the level of Lake Ontario is higher than the elevation of 247 feet (R. 389) and that under Method of Regulation No. 5 the maximum lake level is planned to reach 249.10 feet (R. 394).

The "applicable provisions and requirements * * *" are artfully drawn. Nowhere do they contain any reference to "natural" levels "(A. 357)", except insofar as they are mentioned in Method of Regulation No. 5. While in Paragraph (a) "(A. 36)" a pious genuflection is made in the direction of the protection and indemnity required by

Article VIII of the Boundary Waters Treaty of 1909 for "all interests" which will be injured by the project, it is interesting to note that in Paragraph (i) "(A. 363)" the discharge of water from Lake Ontario is actually regulated to meet only the requirements of Paragraphs (b), (c) and (d) affording protection for others. While all the other interests get actual protection, the Petitioner gets only a pious phrase and the difficulty of litigation in which it is wrongfully handicapped from the start by provisions which say that the natural level of Lake Ontario is the artificially high level created by Gut Dam. The omission of the reference to natural levels was not inadvertent. Article VIII of the Boundary Waters Treaty of 1909, (36 Stat. Part 2, 2448) provides in part:

> "In cases involving the elevation of the natural level of water on either side of the line as a result of the construction and maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby."

It is respectfully submitted that in view of the testimony it can not be said that the elevation of the natural level of waters was not involved. The Court below said in its opinion:

> "There is a dispute as to whether the project works to be constructed under the license will or will not increase the water levels of Lake Ontario." (R. 433).

There is certainly no element of protection in any of the odious "applicable provisions and requirements * * *".

The history of the hearings of the International Joint Commission with law suits pending because no compensa-

tion was paid in the past for the flooding caused by Gut Dam, explains the subterfuge of using the term "past levels" instead of "natural levels."

What Congress intended by the Treaty is clearly indicated when we view the Boundary Waters Treaty of 1909 in the circumstances surrounding it and not in 1952. The experience of Congress in 1909 had been principally with the use of the Great Lakes for purposes of navigation. The construction of dams was to raise levels to provide canals and better channels, Gut Dam, in the year the Boundary Waters Treaty was passed, had been in existence in its final form for a period of about five years. This was the last and immediate experience which Congress had had with Canada as to dams and the raising of water levels.

The Act of Congress (approved June 18, 1902) (32 Stat. L., 392) entitled "An Act Allowing the Construction of a Dam Across the St. Lawrence River" provided:

> "That consent is hereby given for the construction of the portion of the aforesaid dam, which crosses or abuts upon the territory of the United States: Provided, That the type of the proposed dam and the plans of construction and operation thereof shall be such as will not, in the judgment of the Secretary of War, materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen thereof: And provided further, That the work of construciton on United States territory shall not be commenced until plans and details of the work shall have been submitted to and approved by the Secretary of War."

Consent to this dam was given under the hand of Elihu Root, Secretary of War, on the 18th day of August, 1903 and provided:

> "1. That if, after said dam has been constructed, it is found that it materially affects the water levels of Lake Ontario or the Saint Lawrence River or causes any injury to the interests of the United States, the government of Canada shall make such changes there-

in, and provide such additional regulation works in connection therewith, as the Secretary of War may order."

This requirement was in addition to a further clause in that consent which required compensation.

Again, in October 1904, consent was given to an addition to Gut Dam on the condition that the addition was to be removable and the same requirement was demanded of Canada, that if the dam materially affected the water levels of the Lake, or caused any injury, it was to be changed and altered.

That experience shows that the requirement for protection in case of the raising of natural levels was not surplusage, but was an additional requirement in such cases.

The Commission knew this history intimately and knew that in order to raise the natural level they had to provide physical protection. It was with this in mind that it deliberately found that the artificial level with Gut Dam in the outlet was the natural level.

So far as the "applicable provisions and requirements * * *" providing indemnity is concerned, there is no remedy for the properties of Petitioner's members which are appropriated by the nine to eleven inches of flooding taken by Article 19 of the license. It seeks by subterfuge to give the licensee of the power project and Canada as a right obtained by a prescription by 50 year user the artificial level created by Gut Dam in the face of the fact that Canada at the time of the construction of Gut Dam agreed that no prescriptive right would be obtained by the user.

For additional flooding the remedies are inadequate. In its findings, the Respondent made no attempt to determine the financial ability of the licensee to provide either future protection or adequate indemnity for damage. The only finding as to the financial standing of this artificial entity created by the New York Power Authority Act is Finding No. 10 "(A. 203)":

"(10) The Applicant, Power Authority, has presented satisfactory evidence of its financial ability to

construct and operate the proposed Project No. 2000, including the testimony of an underwriting house that all of the necessary securities can be marked at reasonable costs."

Again in Finding No. 25 "(A. 206):"

(25) There is no evidence that public interest would be served by the requirement for further study by the Power Authority of the alleged rights and claims or owners of property bordering upon Lake Ontario as a prerequisite to the issuance of a license in this proceeding."

In the event that damage results to the Petitioner as a result of the construction or negligent operation by the Canadian entity, the existing laws of the United States will not reach such a defendant. Section 10 (c) of the Federal Power Act (16 USCA 791 (a)) specifically provided that the United States shall in no event be liable. The Power Authority Act of the State of New York does not permit a suit against New York. (Power Authority Act of New York, Chapter 772, Laws of New York 1931, as amended by Chapter 146, Laws of New York 1951).

If the Power Authority of the State of New York controls the water levels in accordance with Method of Regulation No. 5, contained in the "applicable provisions and requirements * * *" of Article 19 of the license, it will be controlling the water in accordance with a legal order and will no doubt contend that, accordingly, it is not liable. It may contend that the courts of the State of New York do not even have a right to review the order in question since it originated in an international tribunal. The International Joint Commission has no control over the monies of the Power Authority of the State of New York, inasmuch as the Power Authority of the State of New York was not even the applicant before the International Joint Commission. Assuming the Power Authority of the State of New York is liable for damages caused Petitioner by flooding, it has made no financial provision for paying

these claims. To the contrary, the Power Authority and the State of New York, took the precaution in Sec. 1010 of the Power Authority Act of providing that "* * * any pledge of revenues or other moneys or of a revenue producing contract or contracts * * *" shall create a lien against such properties "* * * valid and binding as against all parties having claims of any kind in tort, contract or otherwise * * *". Putting all its assets "in hock" prior to litigation with Petitioner as to claims belies any good faith on the part of the Power Authority. Respondent has given Petitioner a financial ghost for satisfaction of Petitioner's damages. It made no study or any estimate and has given no consideration to the cost of damages which may be assessed against it on account of the project (R. 392). The only source of money for more than five years is the proposed bond issue which did not take into account the likelihood of damage payments to Petitioner's members except to guard the proceeds against claims. A number of ordinary remedies available to judgment creditors would be difficult in respect to the Power Authority of the State of New York. For example, it is unlikely that a receiver would be appointed or that the project's structures could be sold under execution.

Thus, there is a taking of the property of Petitioner's members without just compensation in violation of the Fifth Amendment of the United States Constitution if the "applicable provisions and requirements * * *" of Article 19 are judicially approved. The amount of Petitioner's properties which will be flooded by the nine to eleven inches involved in the artificial Gut Dam level will have been given to the licensee and Canada, in view of the manner in which the "applicable provisions and requirements * * *" are drawn. Additional properties will be taken by additional flooding under Method of Regulation No. 5 and no adequate remedy is provided by the license for this taking.

CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit, and upon such review the judgment of said Court of Appeals for the District of Columbia Circuit be vacated, reversed, and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

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APPENDIX TO BRIEF

Section 10 (c) of the Federal Power Act (16 U.S.C.A. 791 (a)) provides in part as follows:

> "* * * Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Boundary Waters Treaty of 1909, 36 Stat. part 2, 2448, provides in pertinent part of Article VIII;

> "In cases involving the elevation of the natural level of water on either side of the line as a result of the construction and maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby."

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> "That consent is hereby given for the construction of the portion of the aforesaid dam, which crosses or abuts upon the territory of the United States: Provided, That the type of the proposed dam and the plan of construction and operation thereof shall be such as will not, in the judgment of the Secretary of War, materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen therof: And provided further, That the work of construction on the United States territory shall not be commenced until plans and details of the work shall have been submitted to and approved by the Secretary of War."

The Power Authority Act of New York, Chapter 772, Laws of New York, 1931, as Amended by Chapter 146, Laws of New York, 1951, provides in pertinent part:

> "It is the intention hereof that any pledge of revenues or other moneys or of a revenue producing contract or contracts made by the authority shall be valid and binding from the time when the pledge is made; that the revenues or other moneys or proceeds of any contract or contracts so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act; and that the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded."

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